United Nations AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 913

Case No. 991: MIDAYA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Kevin Haugh;

Whereas, on 23 October 1996, Witty Golden Midaya, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 March 1997, the Applicant again filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 1997 the time-limit for the filing of an application with the Tribunal;

Whereas, on 27 October 1997, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

"a. [To] rescind the decision to separate me from service.

b. [To] award me [a] one-year letter of appointment commencing on 1st February, 1994 to supersede the shorter term extensions of contract which I had been awarded, and [to] effect payment of all my salaries and allowances

to which I was entitled.

....

d. [To order that] UNHCR should institute a proper investigation in the allegations made against me and let me continue working rather than pass judgement before the proper investigations are carried out.

e. [To] compensate me for being mishandled by UNHCR Management.

...

h. [To] clear my name which has been gravely tarnished and compensate me for that.

i. [To] authorize payment of my terminal benefits after almost six years of dedicated service with UNHCR."

Whereas the Respondent filed his answer on 18 December 1998;

Whereas the Applicant filed written observations on 14 April 1999;

Whereas, on 28 June 1999, the Applicant submitted additional documents;

Whereas, on 7 July 1999, the Respondent filed objections to the Applicant's 28 June submission;

Whereas, on 22 July 1999, the Applicant submitted comments on the Respondent's 7 July submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 1 January 1989, on a three-month short-term appointment as Assistant Field Officer, in the National Officer category, at the NO (A)/II level, at the Regional/Branch Office for Malawi. His short-term appointment was successively extended until 1 July 1989, when he was granted a one-year fixed-term appointment. This appointment was extended successively until 31 January 1993, when the Applicant resigned his National Officer post in order to accept an international post. On

1 February 1993, he commenced a one-year intermediate-term appointment as Field Officer, at the L-2, step I level, at Mandera/Banissa, Kenya. On 1 August 1993, the Applicant was reassigned to Dadaab, Kenya. From 1 January to 9 July 1994, the Applicant was sent on mission to Kampala, Uganda. His appointment was extended several times until 16 July 1994, when the Applicant separated from service.

On 10 May 1994, five staff members including the Head of the Field Office, Pakelle, sent a petition to UNHCR Representative in Kampala, requesting him to "recommend to Headquarters a change of duty station of [the Applicant] since none of us are happy with the way he conducts his affairs."

In a cable dated 31 May 1994, the Deputy Representative, UNHCR, Kampala, recommended to the Personnel Administration Section (PAS), the extension of the Applicant's appointment until the end of September 1994. In a further cable dated 1 June 1994, the Deputy Representative asked PAS, to disregard the 31 May cable, and noted that a recommendation concerning the extension would follow an assessment of the staff member's performance.

On 13 June 1994, the Deputy Representative, UNHCR, Kampala, wrote to the Head of Desk II, Regional Bureau for Africa, UNHCR Headquarters, recommending that the Applicant's contract not be extended beyond its date of expiration. The Deputy Representative explained that following "a combined mission ... undertaken by the Administrative Officer and Programme Officer to Sub-Office Pakelle on 9 June 1994 for further assessment of Mr. Midaya's performance", consultations with staff demonstrated that:

"...

> [The] staff member is very poor in demonstrating initiative for his presence in the camps. His negotiation and managerial skills in handling the local authorities, NGO's and staff members in Field Office Kitgum and Sub-Office Pakelle at least to be [sic] called unsatisfactory. Moreover, we would like to emphasize that Mr. Midaya's personal relations with his colleagues are very weak and most of the times this creates many problems in the moral [sic] of the office.

..."

In an undated handwritten note in the Applicant's official status file, the Head of Desk II, Regional Bureau for Africa (RBA), noted that he supported the recommendation for non-extension of the contract.

On 15 June 1994, the Senior Personnel Officer, Division of Human Resources Management (DHRM), UNHCR, compiled a report concerning allegations of sexual misconduct leveled against the Applicant. The Personnel Officer wrote in the Executive Summary and Key Recommendation, inter alia:

> "...
>
> This report does not result from any formal investigation into the allegations made against [the Applicant]. ...
>
> Rather, the report is a catalogue of the allegation made against [the Applicant]: taken together, the variety of sources and locations from where these allegations have arisen, constitute a mass of circumstantial indications that the staff member has conducted himself in a manner which is incompatible with the standards expected of international civil servants, resulting in the recommendation that
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> > *Mr. Midaya's present fixed term appointment therefore not be extended, and that he on the expiration of his present appointment be separated from service.*"

On 21 June 1994, the AVSI Camp Coordinator, Kitgum, forwarded a petition, signed by five AVSI staff members including himself, to the UNHCR Acting Representative, Branch Office, Kampala. The petition requested that the Applicant be transferred away from that duty station and accused the Applicant of rarely visiting the Acholpii Camp, of "not contribut[ing] in any way to the demanding job of looking after the Refugees," and of "creat[ing] confusion and misunderstanding [among] Authorities, refugees and [the AVSI staff]."

On 1 July 1994, the Applicant's appointment, due to expire on 30 June 1994, was extended for two weeks and two days until 16 July, so that the Applicant could finalize his separation formalities. On 6 July 1994, the Applicant was evacuated to Kampala, Uganda, for security reasons, and upon his arrival he was informed by the Representative, Deputy Representative and Administrative Officer, Kampala, that his contract would not be extended beyond 16 July 1994.

On 8 July 1994, the Applicant requested the Deputy Director, DHRM, UNHCR, to reconsider the decision not to extend his contract.

On 9 July 1994, the Applicant's mission to Uganda ended, and he returned to Nairobi, Kenya. On 15 July 1994, the Applicant requested the Director, DHRM, and the Director, RBA, Geneva, to give him reasons for the decision not to extend his contract and to consider him for service elsewhere in the Organization. On 16 July 1994, the Applicant separated from service.

On 21 July 1994, a Personnel Officer, UNHCR, Geneva, advised the Applicant that the Director, DHRM, had reconfirmed his original instruction to effect separation following the recommendation for non-extension of the Applicant's appointment.

On 29 July 1994, the Applicant wrote to the Chairman of the Staff Council, with a copy to the Director, DHRM, and to the Director, RBA, Geneva, requesting his intervention in the matter. On 29 August 1994, the Chairman of the Staff Council wrote to the Director, DHRM, claiming that the Applicant had not received due process in connection with the decision not to renew his contract and requesting, inter alia, that the Applicant be reinstated and that a proper investigation into the allegations against the Applicant be instituted.

On 2 September 1994, the Senior Personnel Officer responded to the letters received by DHRM from the Applicant, noting in part, as follows:

"...

On the question of your appointment to the L.2 level, you will recall that the reason for delay in issuing your letter of appointment was the fact that we had not received your written resignation from your previous National Officer post. You will also recall that you, at the time, were offered the option of either resigning from the National Officer category and being immediately appointed at the internationally recruited professional level, or of retaining a lien to your National Officer post and being granted a temporary special post allowance to the Professional category; in the event, you opted for the first option. The appointment to the L category rather than to the P category was - and remains - standard practice in such cases. For your information, the numerous written queries to which you make reference in paragraph 1 of your memorandum are not on file.

...

In your memorandum dated 8 July 1994 ... you make reference to conversations I held with you in Pakelle in April 1994 during which I informed you that I had been requested to look into the allegations of sexual harassment which had been made against you. ... I made additional enquiries into the matter, and my findings were later compiled in a confidential report, which I submitted to the Director of DHRM. I am enclosing in a sealed envelope a copy of this report, which, as you will note, concludes that DHRM should not - in view of the recommendation for non-extension of appointment received in the meantime - pursue the matter of possible disciplinary action against you based on the material available to us at that time.

However, the findings of my preliminary report were that there appeared to be sufficient circumstantial indications to support the conclusion that you had not conducted yourself in a manner expected of international civil servants, and that you, in spite of several warnings from a number of supervisors in at least two countries, had apparently failed to heed the advice offered to you to conduct your professional and personal affairs in an appropriate manner, and finally that your conduct had reflected unfavourably on UNHCR in three different countries [for] almost as many years.

..."

On 3 January 1995, the Applicant responded to the Senior Personnel Officer, denying the allegations of sexual misconduct contained in the confidential report.

Also on 3 January 1995, the Applicant requested the Secretary-General to review the decision not to extend his contract. Having received no substantive response to his request for review, the Applicant lodged an undated appeal, received by the Joint Appeals Board (JAB) Secretariat on 24 March 1995.

The JAB adopted its report on 20 August 1996. Its findings, conclusion and recommendation read as follows:

> "30. The Panel examined the receivability of the appeal under staff rule 111.2 (a) and (f). The Panel noted that the Appellant was notified of the administrative decision not to renew his contract on 6 July 1994 and that he wrote to the Secretary-General on 3 January 1995, i.e. six months after he had been notified of the decision.
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> 31. In the light of the JAB file, the Panel examined the appeal to determine whether there were exceptional circumstances that might justify a waiver of the time-limits, as provided for under staff rule 111.2 (f), but was unable to find any. Indeed, the Panel could not accept that writing to the Deputy Director, DHRM, and to the Chairman of the Staff Council precluded the Appellant from requesting the administrative review of the contested decision in due time. The Panel also noted that the Appellant was already in contact with the Chairman of the Staff Council in late July and in August 1994. Therefore the Panel considers the appeal as time-barred.
>
> **Conclusion and recommendation**
>
> 32. The Panel concluded that the appeal was time barred and that there were no exceptional circumstances which could justify a waiver of the time-limits, in compliance with staff rule 111.2 (a) and (f).
>
> 33. Consequently, the Panel makes no recommendation in support of this appeal."

On 19 September 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report and has taken note of the conclusions of the Panel that your appeal was time-barred and that there were no exceptional circumstances which could justify a waiver of the time-limits. He has also noted that the Panel made no recommendation in support of your appeal, and, accordingly, the Secretary-General has decided to take no further action in respect of your case.

..."

On 27 October 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's contract should be rescinded because it was based on fabricated allegations that UNHCR never properly investigated and on a report that the Applicant did not have the opportunity to rebut.

2. The Applicant had a legitimate expectation that his contract would be renewed.

3. The Applicant should be paid termination benefits because he had only resigned from his National Officer post on the basis of the representation that he would receive a P-2 appointment.

Whereas the Respondent's principal contentions are:

1. The Applicant's appointment, made under the 200 Series of the Staff Rules, carried no expectancy of renewal. UNHCR has not, by its behaviour, created a legal expectancy of renewal. Efficient or even outstanding behavior does not create a legal expectancy of renewal.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives or any other extraneous factors.

3. Termination indemnity is only payable to staff whose appointments have been terminated. The Applicant is not entitled to such indemnity because his appointment simply expired.

The Tribunal, having deliberated from 29 June to 23 July 1999, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision dated 19 September 1996, accepting the recommendation of the JAB that the Respondent find that the appeal was time-barred and that no exceptional circumstances had been established which justified a waiver of the time limits. The Applicant claims that his application is receivable and that the non-renewal of his fixed-term appointment was a violation of his rights. He requests the Tribunal to award him a one-year appointment, to compensate him for damages arising from the mishandling of his case by UNHCR, and to grant him a termination indemnity after almost six years of service.

II. First, the Tribunal must determine whether the appeal was time-barred. Staff rule 111.2 provides, inter alia:

> "(a) A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such a letter must be sent within two months from the date the staff member received notification of the decision in writing.
>
> ...

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal."

III. On 1 July 1994, the Deputy Director, DHRM, informed the Branch Office, Malawi, that the Applicant's appointment would not be extended beyond 16 July 1994. On 6 July 1994, the Representative, Deputy Representative and Administrative Officer, Kampala, orally informed the Applicant that his contract would not be renewed. On 8 July 1994, the Applicant requested the Deputy Director, DHRM, to reconsider the non-extension of his contract. That letter establishes beyond argument that the Applicant was aware of the decision not to renew his fixed-term appointment. In accordance with the provisions set forth in staff rule 111.2 (a) any request by the Applicant for the Secretary-General to review the decision not to extend his appointment should have been made by 8 September 1994. The Applicant did not request review of the decision until 3 January 1995. Even if the Tribunal were to accept, as the final administrative decision against which he was appealing, the letter of 2 September 1994 from the Senior Personnel Officer, DHRM, confirming to the Applicant that the date of his separation from service was 15 July 1994, the Applicant's request for review would still be two months late. The Tribunal has consistently, in its decisions, emphasized the importance of complying with the mandatory time-limits set out in the Staff Rules. (Cf. Judgements No. 527, Han (1991); No. 549, Renninger (1992); No. 596, Douville (1993); and No. 796, Xu et al. (1996)).

IV. The Applicant claims that "exceptional circumstances" apply in his case, justifying a waiver of the time limits under staff rule 111.2(f). He submits that the absence of replies from the Director and Deputy Director, DHRM, and the absence of advice from the Chairman of the Staff Council concerning his case constitute "exceptional circumstances". The Tribunal finds that the JAB properly rejected this

claim. The Tribunal has consistently held that "exceptional circumstances" justifying waiver of the time limits must consist of events beyond the Applicant's control that prevent the Applicant from timely pursuing his or her appeal (cf. Judgements No. 372, Kayigamba (1986); and No. 713, Piquilloud (1995)). Therefore, the Tribunal holds that the appeal was time-barred.

V. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary